

## FAIR POLITICAL PRACTICES COMMISSION

### Memorandum

**To:** Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

**From:** C. Scott Tocher, Commission Counsel  
Luisa Menchaca, General Counsel

**Re:** Section 89519 - Surplus Funds: Adoption of Proposed Regulation 18951

**Date:** July 21, 2003

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The use of campaign funds and the prohibition on their expenditure for "personal use" is governed by Government Code sections 89510 through 89522. The expenditure of campaign funds by candidates must be, at a minimum, reasonably related to a political, legislative, or governmental purpose associated with the candidate's office. Where an expenditure, however, confers a substantial personal benefit on a candidate, the expenditure must be directly related to a political, legislative, or governmental purpose. Where campaign funds become "surplus" campaign funds, the personal use law further limits their expenditure.

At its June meeting, the Commission held a prenotice discussion of proposed regulation 18951 and resolved several issues of interpretation.<sup>1</sup> Since the meeting, staff from the Legal, Technical Assistance and Enforcement Divisions have met and regulation 18951 has been redrafted to incorporate the decisions made by the Commission. **Staff proposes the Commission adopt regulation 18951.** (Exhibit 1. The version attached is identical to the version sent to the Office of Administrative Law for notice purposes.)

#### **I. ISSUES DETERMINED BY THE COMMISSION'S PRENOTICE DISCUSSION.**

Generally, the regulation seeks to define terms in the statute, describe implementation in common factual scenarios and establish the parameters in which the statute operates. At the June Commission meeting, the following decisions were made:

- The Commission believed that withdrawn candidates should be treated the same as non-incumbent defeated candidates with respect to when funds become surplus. The Commission requested the language of such a provision be clarified and options be

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<sup>1</sup> An overview of the "personal use" laws, as well as a discussion of the historic treatment of surplus funds elsewhere in law and under the Act, was discussed in the staff memorandum introducing the prenotice discussion of this item at the June, 2000, Commission meeting. The memorandum, dated May 20, 2003, may be retrieved from the Commission's website ([www.fppc.ca.gov](http://www.fppc.ca.gov)) under the June 5 Commission meeting agenda.

presented for the Commission's consideration. *These options are reflected in subdivision (a)(2) of the regulation, under "Decision 1."*

- Funds belonging to deceased candidates should not become surplus immediately upon the death of the candidate. Rather, the Commission determined that these funds will become surplus at the earlier date of either June 30 or December 31 following the candidate's death. *This decision is reflected in subdivision (a)(3) of the regulation.*
- The regulation should address the provisions of the Act that govern funds raised before January 1, 1989, and funds raised by committees not covered by section 89519's provisions. *The additional optional language sought by the Commission is reflected in subdivision (e) of the regulation.*

## II. PROPOSED REGULATION 18951

The regulation is largely unchanged from the version considered by the Commission at the prenotice discussion in June. **Two decision points remain to be considered and can be found in subdivisions (a)(2) and (e).** Nevertheless, for the record each subdivision is summarized below. **Subdivisions with new or revised language are indicated below with a bold heading.**

### A. Subdivision (a) - Application to Post-1989 Funds

Subdivision (a) of the regulation sets forth the definition of "surplus funds" provided in section 89519. Each subsection thereof further clarifies the standards applicable to the various types of candidates who may have surplus funds. Because the statute expressly applies only to post January 1, 1989, funds, pre-1989 funds are addressed below, in subdivision (e). Subdivision (a)(1) of the regulation is unchanged from the last version seen by the Commission at the June, 2003 meeting.

#### 1. Subdivision (a)(1):

Subdivision (a)(1) identifies the date on which funds become surplus with respect to incumbent candidates. Because section 89519 provides two alternative dates for incumbent candidates,<sup>2</sup> the rule states that an incumbent's funds for that elective office become surplus on *the latter of either of two dates*: 1) the date he or she leaves office if the incumbent has not run for reelection or was defeated in the primary; or 2) the end of the postelection reporting period following his or her defeat. In this scenario, funds belonging to a term-limited member of the State Assembly would become surplus on the day the incumbent leaves office. Also, if an incumbent member of the Assembly were to lose the party nomination in the primary election, the candidate's leftover funds would become surplus on the date he or she leaves office. If, on the other hand, that same

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<sup>2</sup> Subdivision (a) of section 89519 states, "Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, ...." (Underlining added.)

Assembly candidate loses reelection in the November general election, his or her leftover funds would become surplus at the end of the postelection period following the November election. For the November general election, the end of the postelection reporting period is December 31 of the same year. (§ 84200, subd. (b).) The second sentence of the rule reminds candidates that these funds become surplus at this time *unless* the officeholder has opened a new committee for another office and has transferred the funds to that new committee.

## **2. Subdivision (a)(2) - Decision Point 1.**

Subdivision (a)(2) identifies the date on which funds become surplus with respect to non-incumbent defeated candidates and withdrawn candidates. In this respect, the funds become surplus at the end of the postelection reporting period following the candidate's defeat. Thus, if the candidate were defeated in a primary election in March, any unused campaign funds would become surplus on June 30th, the last day of the postelection reporting period for which the committee will file a report. (§ 84200, subd. (b).) For the November general election, the end of the postelection reporting period is December 31 of the same year. (*Id.*) If the candidate wishes to use the funds for his or her future election, the candidate must transfer the funds to a new committee prior to the date just described.

**Decision 1:** At the June Commission meeting, an issue arose with respect to the regulation's treatment of candidates who "withdraw" from the race. Specifically, because the term is not defined in the Act, a question arose as to how a "withdrawn" candidate is identified and on what date a candidate becomes "withdrawn." The Commission asked staff to bring back language that clarified when a candidate is deemed "withdrawn" and how they should be treated.

Certain legal provisions are relevant to understanding how a rule regarding withdrawn candidates would work. Under the Act, a candidate becomes a candidate when he or she does any of the following: 1) gets listed on a ballot or qualified to appear on a ballot; 2) receives a contribution or makes an expenditure (or authorizes these) to be nominated for any elective office; 3) becomes the subject of a recall election. (§ 82007.) While a candidate must file a Form 501 (section 85200) declaring an intention for candidacy, a candidate ends that status by filing a termination committee statement. (§ 84214; Regs. 18404; 18404.1.) As to the Elections Code, no provision exists defining a withdrawn candidate. Under the Elections Code, a person's name shall not appear on a ballot unless a declaration of candidacy has been filed. (Elec. Code § 8550.)<sup>3</sup> This document is filed at least 88 days prior to the election but may be filed *only* if the candidate has filed nomination papers (to be filed between 88 and 113 days prior to the primary election). (Elec. Code § 8020.) While the Elections Code does not define a "withdrawn" candidate,<sup>4</sup> the Elections Code prohibits a candidate from withdrawing as a

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<sup>3</sup> Interestingly, the affidavit of candidacy requires the candidate declare that he or she will not withdraw as a candidate before the election. (Elec. Code § 8550, subd. (d).)

<sup>4</sup> Elections Code section 6342 provides for withdrawn candidates only in Presidential elections.

candidate in a primary election once the declaration of candidate has been filed. (Elec. Code § 8800.) Candidates may withdraw during the general election only under limited circumstances. (Elec. Code § 8801.)

In this context, the issue generally arises at the FPPC when a candidate *self-identifies as a withdrawn candidate* and seeks advice as to the governing timelines. (See, e.g., Willet Advice Letter, No. A-96-103.) Otherwise, a candidate who does not withdraw from a race may be easily identified by the presence of his or her name on the ballot and continuous campaign-related activities. Thus, the question of whether a candidate has withdrawn from a race usually is not an issue. Moreover, the regulation avoids a timeline that keys off the date when a candidate withdraws (and instead refer to the election following the withdrawal), thereby avoiding the burden of identifying specifically the date on which a withdrawal occurs. As a result, defining specifically the date a candidate is a withdrawn candidate becomes less urgent.

Nevertheless, staff revised subdivision (a)(2) to clearly provide when the funds become surplus after a candidate withdraws from an election. **"Option A"** identifies the triggering date as the end of the postelection reporting period "following the election in which the candidate was defeated" **or** "from which the candidate withdrew." Therefore, both defeated and withdrawn candidate funds become surplus immediately following the election for which they were running.

The prior version discussed in June, however, referred to the postelection period "following the defeat or withdrawal of a candidate for elective office for which the campaign funds were raised." This raised an issue as to whether this sentence referenced a primary or general election. By avoiding referencing the election "for which the campaign funds were raised," one avoids the potential of different timelines applying to a single candidate who withdraws before a primary election but who already has raised funds for the general election, as well.<sup>5</sup>

**"Option B"** is a slightly different version that simply states, without more, that withdrawn candidates are treated the same as defeated candidates for purposes of the regulation.

**Staff recommendation: Staff recommends the Commission adopt Option A.** There is staff consensus that withdrawn candidates should be mentioned explicitly in the regulation given the likelihood of questions from such candidates on this issue. Merely referencing "other" candidates in a regulation instead of explicitly referencing withdrawn candidates would not give explicit guidance on the issue. The fact that the term "withdrawn" is not defined under either the Act or the Elections Code suggests there is not significant controversy over the term. Of course, should experience dictate problems

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<sup>5</sup> Section 85318 permits candidates to accept contributions for the general election prior to the primary election and permits separate accounts for the segregation of these funds. Section 85318 also dictates that if a candidate withdraws or is defeated prior to the general election, those funds must be returned to contributors to the committee on a pro rata basis.

not heretofore seen in the absence of such a definition, the Commission could address the issue at a later date.

Staff believes "Option A" provides more explicit guidance to the regulated community as to how withdrawn and defeated candidates shall be treated.

### **3. Subdivision (a)(3):**

**Subdivision (a)(3) implements the Commission's prior decision to treat deceased candidates like other candidates under the statute and provides a window of time following the candidate's death before the funds become surplus.<sup>6</sup>**

#### *B. Subdivision (b) - Identifying the Postelection Period.*

Subdivision (b) defines the "window period" between a candidate's defeat and the time a candidate's campaign funds become surplus, in which the candidate is permitted to use his or her campaign funds consistent with the personal use sections in section 89510 et seq. Defining "end of the postelection reporting period," this subdivision is consistent with the filing periods set forth in section 84200, subdivision (b).<sup>7</sup>

#### *C. Subdivision (c) - When Funds are "Raised"*

Because section 89519 only applies to funds "raised" after a certain date (either before or after January 1, 1989), the point at which campaign funds are raised takes on a special importance. The statute, however, does not define the term. For example, campaign funds could be considered raised at the time they are solicited, tendered, accepted or deposited by the candidate. Subdivision (c) of the regulation answers this question, stating campaign funds are "raised" upon "receipt," as disclosed on the candidate's campaign disclosure forms. This is consistent with the language of section 84211 of the Act, regulation 18421.1 and with the Commission's policy in 1990 as set forth in former regulation 18587, which dealt with similar issues.<sup>8</sup>

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<sup>6</sup> The extra time preserves several options. For instance, once funds become surplus a committee may no longer contribute those funds to other candidates for office in a California election nor contribute those funds to a political party committee for the purpose of supporting or opposing candidates for elective office. (§ 89519, subd. (b)(5).)

<sup>7</sup> Neither the statute nor the regulation provides a "window period" for incumbents who voluntarily leave office or withdraw from an election campaign.

<sup>8</sup> It will be remembered that regulation 18587 was an attempt by the Commission in 1990 to adopt a regulation interpreting the surplus funds statute in effect at that time. Due to objections from the Office of Administrative Law, the adoption process never was formally completed and the regulation therefore never in effect.

D. Subdivision (d) - Commingling Funds

Subdivision (d) establishes a presumption that where campaign funds raised prior to January 1, 1989, have been commingled with campaign funds raised after that date, the total amount in the campaign bank account will be presumed to have been raised after January 1, 1989. The presumption should simplify disposal of surplus campaign funds under the disparate system of pre- versus post- January 1, 1989, funds. This language embodies staff advice given in the *Craven* Advice Letter, No. A-97-373a which was based on the prior regulation 18587. It is worth remembering that as time goes on this aspect of the regulation will be utilized less frequently as committees are terminated.

E. Subdivision (e) - Limit of Section 89519 - Decision Point 2.

Subdivision (e) addresses the situation of the disposition of campaign funds belonging to campaign committees, for instance, candidate-controlled ballot measure committees, or pre- January 1, 1989, funds. In these cases, the regulation clarifies that the surplus funds rule of section 89519 will not apply. At the June meeting, staff proposed two options be considered by the Commission - the language found in **Option A** (stating that section 89519 does not govern these funds) and **Option B** (going further to state which rules *do* apply - i.e., the other personal use rules of sections 89510 et seq).

**Option A** leaves open the question of whether pre-1989 funds are governed by the Act at all. **Option B** would codify staff's view that without the reenactment of former Elections Code section 20300, the governing "personal use" law is encompassed in the general provisions of sections 89510-89518 and sections 89520-89522 apply. The latter are enforcement provisions. **Observing that the additional advice would be helpful and that the different versions were not mutually exclusive, the Commission recommended the two options be merged into a third, Option C.**

**Staff Recommendation:** Staff agrees with the Commission that Options A and B are not mutually exclusive and therefore **recommends the Commission adopt Option C.**

**III. OVERALL STAFF RECOMMENDATION**

Staff recommends that the Commission **adopt regulation 18951** as discussed above.

Attachments:

1. Draft Regulation 18951